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Office Supreme Court, U.S.
FILED
JUN 22 1959
JAMES R. BROWNING, Clerk

No. [redacted] 139

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

D. C. TRANSIT SYSTEM, INC., *Petitioner*

v.

MARGARET H. SLINGLAND and UNITED STATES OF AMERICA, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

FRANK F. ROBERSON
Counsel for Petitioner,
810 Colorado Building,
Washington 5, D. C.

June 22, 1959

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Petitioner, D. C. Transit System, Inc., prays that a writ of certiorari issue to review that portion unfavorable to it of the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on April 17, 1959.

OPINIONS BELOW

The District Court rendered no opinion, but signed an order on the points here involved (R. 21-22). The

opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 85-92) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on April 17, 1959 (R. 93). The Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether a defendant is entitled to exoneration or indemnity from a co-defendant that had the last clear chance to avoid an accident which injured a third party.

2. Whether a carrier held liable to its passenger by reason of the high degree of care arising from a contract of carriage is entitled to exoneration or indemnity from a co-defendant which failed to exercise ordinary care as to the carrier.

3. Whether the Court of Appeals properly evolved a formula for contribution among co-defendants which would require each to pay a plaintiff that percentage of the judgment against it which the higher of the judgments bore to the sum of the judgments rather than the equal apportionment directed by the District Court.

STATEMENT

Margaret H. Slingland filed a complaint against D. C. Transit System, Inc. and the United States of America in the United States District Court for the District of Columbia seeking damages for personal injuries sustained when a United States mail truck struck the rear of a standing Transit bus from which

the driver was temporarily absent and on which she was a passenger. (R. 2, 34.) The District Court had jurisdiction as to Transit because of the amount in controversy and the place of the accident and as to the United States because of the Federal Tort Claims Act.

The case against Transit was tried to a jury at the same time the presiding judge tried the non-jury case against the United States. The judge found against the United States and assessed the damages for Miss Slingland's injuries at $10,000 (R. 20-21) whereas, on the same evidence, the jury found against Transit and awarded plaintiff $25,000 (R. 13), later reduced by remittitur to $15,000 (R. 18-19). In post-trial motions, Transit on its cross-claim sought full exoneration from the United States asserting that the mail truck driver had the last clear chance to avoid striking the unattended bus and also that the Government should not be allowed to benefit from the high degree of care owed the passenger by Transit under its contract of carriage (R. 15-16). Alternatively, Transit asked contribution from the United States of one-half the sum awarded to plaintiff against Transit (R. 17-18). The court denied the claim for indemnity or exoneration, but ruled that either defendant paying the plaintiff more than one-half the judgment awarded against it was entitled to judgment against the other defendant for any amount exceeding the one-half (R. 21-22).

The court below: (1) because of an error in the District Court's charge to the jury, (R. 89), reversed the judgment on the jury verdict and remanded the case for a new trial as to Transit (R. 92, 93); (2) set aside the District Court's order which had prescribed contribution at one-half and directed that should the question again arise on remand, it was to be resolved

by a different formula set out in the appellate court's opinion (R. 93). As to Transit's claim for full exoneration due to the Government driver's last clear chance to avoid the accident, the court below in its opinion conceded support for Transit's position, (R. 90), in a Fourth Circuit case where the United States as a defendant had successfully urged it against its co-defendant [*United States* v. *Savage Truck Line*, 209 F. 2d 442 (4th Cir. 1953), *cert. denied*, 347 U.S. 952 (1954)] but rejected Transit's claim which the United States was here opposing because:

> "... we think the concurrently negligent participation of both defendants, even though the United States might have had the last clear chance, calls 'in equity and good conscience' for no more than contribution between them." (R. 90-91.)

The court below also rejected the claim for full exoneration notwithstanding Transit's higher degree of care to its passenger arose from a contract of carriage for which the United States had paid no consideration (R. 91). Finally, in discarding the District Court's contribution award of one-half, the Court below set forth in lieu thereof a new formula, "referred to" but disparaged by the United States, whereby any jury award on the remand against Transit is to be added to the $10,000 already awarded against the United States and each is then to pay that percentage of the judgment against it which the larger of the two sums bears to the sum of the judgments (R. 91-92). The only authority cited by the court for this formula (R. 92) was an anonymous student's note in 68 HARV. L. REV. 697, 705-706 (1955) which the United States had said in its brief was a fair compromise, but:

> "departs entirely from both judgment amounts and we think that such a result probably must be

achieved by appropriate legislation, towards which, indeed, the law review note was directed." (Brief below for United States, p. 20.)

REASONS FOR GRANTING THE WRIT

1. The decision of the court below in the instant case, upon whether one concurrent tortfeasor can recover full exoneration from another tortfeasor which had the last clear chance to avoid the accident, is erroneous and in conflict with the decision of the United States Court of Appeals for the Fourth Circuit in *United States* v. *Savage Truck Line*, 209 F.2d 422 (1953), *cert. denied*, 347 U.S. 952 (1954). This conflict was seemingly conceded in the opinion of the court below which cited *Savage* as "some support" for Transit's position (R. 90). The United States, hard-pressed for an explanation since when positioned like Transit it had successfully secured exoneration from the private tortfeasor in *Savage*, had sought to justify *Savage* upon a contract of bailment theory (Brief below for United States, p.14). However, the court below herein did not refer to the alleged distinction and it is refuted by the fact that the United States in *Savage* had cited cases from the District of Columbia and urged the last clear chance and bailment theories as entirely separate points. (See *United States* v. *Savage Truck Line*, supra at 444; abstract of *Savage* brief for United States in 44 ALR 2d 984, 987.) The result reached in the Fourth Circuit was also that applied in *Colorado & S. Ry.* v. *Western Light & Power Co.*, 73 Colo. 107, 214 Pac. 30 (1923) where a transit company was held entitled to indemnity from its co-defendant for the amount it had been compelled to pay as a result of the death of two of its passengers. One positioned like Transit in the case at bar, having been held liable

to its passenger injured by the tortious conduct of the United States, should be entitled to recover the cost of repairing its passenger, just as it could have recovered under last clear chance for damage to its bus. Thus, in *Restatement, Restitution*, § 94 (1937):

> A person who has become liable in tort to another because of an injury caused by his negligent failure to protect the other's person or property from the tortious conduct of a third person is entitled to indemnity from such third person for expenditures properly made in the discharge of such liability, *if the payor could have recovered from the third person for an injury so caused to himself or to his own property.* (Emphasis added.)

2. The decision in the court below in the instant case, by denying exoneration to a carrier from one who paid no consideration for the high degree of care owed a passenger by the carrier, erred in an important situation which arises throughout the country, and hence, unless reversed, constitutes a precedent for error likely to have widespread effect. The correct rule is stated in *Wheeler* v. *Glazer*, 137 Tex. 341, 346, 153 S.W. 2d, 449, 452 (1941):

> Where the injury forming the basis for the judgment against the joint tort-feasors results from a violation of a duty which one of the tort-feasors owes to the other, the latter, at common law, is entitled to contributions or indemnity from the former (citing authorities). Under these circumstances, we think that, even if the street car company had been required to pay the judgment in favor of Mrs. Wheeler, or any part thereof, by reason of its failure to exercise a very high degree of care for her protection, yet it would have been entitled at common law to have complete indemnity from Glazer.

The rule thus stated by the Texas Supreme Court is correct and supported by the legal commentators. Hodges, "Contribution and Indemnity Among Tort-feasors", 26 TEX. L. REV. 150, 162 (1947); Davis, "Indemnity Between Negligent Tort-feasors: A Proposed Rationale", 37 IOWA L. REV. 517, 530 (1952).

3. The "percentage" formula for contribution between tortfeasors, judicially applied for the first time by the court below, is believed to be erroneous. For the reason that judgments in different amounts, a situation arising recurrently throughout the country, is "an unsettled field of tort law" in which there is "no statutory rule to guide", it is most important that the correct common law principle be announced by the Supreme Court of the United States. If the problem is to be solved without legislation, this Court is the one which should point the way and not have scores of courts throughout the country each applying its individual notion as to "a fair and equitable solution". The formula mentioned by a law student writing about "legislative adjustments", 68 HARV. L. REV. 697, 705-706 (1955), which the United States concedes "departs entirely from both judgment amounts and we think that such a result probably must be achieved by appropriate legislation" (Brief below for United States, p. 20), is an inadequate basis for the radical innovation applied by the court below. The District Court herein, lacking a legislative guide or an authoritative decision by this Court, has been reversed for applying the usual rule of equity and fundamental justice and apportioning the damages equally. The trial court's solution was in accord with the general rule that "the pro rata shares of common liability are usually equal". (Gregory, "Contribution Among Tortfeasors: A Uniform Prac-

tice", 1938 WIS. L. REV. 365, 372) and not apportioned on any comparative basis (1 Harper & James, *Torts* (1956) 718, 719). As one court said in *Heimbach* v. *Hagen*, 1 Wis. 2d 294, 296, 83 N.W. 2d 710, 712 (1957):

> Contribution between joint tort-feasors is in origin an equitable principle, and arises when one joint tort-feasor pays more than his equitable share of the damages. * * * Where there are two joint-tort-feasors, that share is fixed by law at one-half.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANK F. ROBERSON
Counsel for Petitioner.

June 22, 1959